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No. 96-456

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JAMES B. HEALY

Petitioner,

vs.

FAIRLEIGH DICKINSON UNIVERSITY, FRANCIS J. MERTZ, NANCY S. BARRETT, MORDECHAI ROZANSKI,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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14 pp

TABLE OF CONTENTS

Page

Table of Authorities ii

Constitutional and Statutory Provisions iii

Reply to the Counterstatement of the Case 1

Reply to Respondents' Points 3

Conclusion 10

TABLE OF AUTHORITIES

CASE CITATIONS **Page**

Adam v. Saenger, 303 U.S. 59, 61 (1938) 3

Board of Regents v. Roth, 408 U.S. 564 (1972) . . . 6,9

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) 7

Healy v. Fairleigh Dickinson University, 287 N.J. Super 407 (1996), 671 A.2d 182 (1996) 7

Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) 15

Meyer v. State of Nebraska, 262 U.S. 390 (1923). . . . 10

Newark Publishers Assoc. v. Newark Typographical Union, 22 NJ 419 (1956). 6

New York Central & Hudson Railroad Co. v. City of New York, 186 U.S. 269 (1902). 5

Perry v. Sinderman, 92 St.Ct. 2717 (1972) 6,9

Shelley v. Kraemer, 334 U.S. 1 (1930). 12

Sullivan v. Texas, 207 U.S. 416 (1908). 3

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I 9,10

U.S. Const. amend. XIV. 6,7,8,9

STATUTES

28 U.S.C. § 1257 3

RULES

Fed. R. Civ. P. 12, 13, 14.5 4,5

REPLY TO THE COUNTERSTATEMENT OF THE CASE

Respondents' Counterstatement of the Case is disputed on several points. Petitioner's contention is that his faculty position cannot be terminated without adequate cause because of his acquisition of tenure and/or because Fairleigh Dickinson University failed to accord him the contracted procedures associated with the faculty position and any dismissal therefrom. Respondents' counterstatement skirts these points by mischaracterizing the dispute around the termination of the senior administrator position.

Further, counsel for the University again attempts to disparage petitioner through incorrect and extraneous assertions about petitioner's teaching qualifications, which unfortunately have made their way into the lower courts' decisions. Specifically, the Counterstatement of the Case in respondents' brief claims that petitioner does not have a prerequisite doctorate degree for tenure. Petitioner's teaching qualifications as a faculty member were not at issue for, or reviewed by, the University at the time preceding his dismissal. That review was limited only to a performance evaluation associated with the administrator position. The University refused to recognize petitioner's faculty status, thereby avoiding the contract procedures attendant thereto, including peer review of his faculty qualifications before any action relative to his retention or removal from the faculty. The jury has determined that petitioner was a faculty member at the time of his separation from the University; the courts failed in their decisions to accord petitioner the due process associated with that status.

The assertion of counsel for the respondents that a doctorate was a tenure prerequisite found in the University's Faculty Handbook is incorrect. The 1988 FDU Faculty Handbook's section on tenure (Section 5.1 - Renewal of

Probationary Faculty) sets forth the criteria as "Appropriate academic degrees and, where applicable, other certifications." It is possible to acquire tenure without a doctorate degree. The level of degree is really associated with faculty rank, not tenure; tenure is related to time of teaching service whereby protections are acquired relative to dismissals without adequate cause in order to protect academic freedom and the free exchange of ideas and the pursuit of knowledge so integral to the educational endeavor.

The 1988 FDU Faculty Handbook (relevant portions of which were placed into evidence at trial and are found in the Plaintiff-Appellant's Appendix to the N.J. Superior Court, Appellate Division) is consistent with the above in that Section 1.3 (Criteria for Faculty Ranks) sets forth the level of degree or equivalent for each rank. Hence, for the rank of Instructor, "the candidate must possess an earned master's degree (or equivalent) and demonstrate potential for effective teaching...." "A candidate for Assistant Professor "...must possess the earned doctoral or professional degree or equivalent normally required for teaching in his or her field...." For promotion or appointment to the rank of Associate Professor, the candidate must possess the qualifications for an Assistant Professor, and, in addition, professional growth and accomplishment beyond the earned doctorate or its equivalent demonstrated by scholarly publication or other externally recognized work appropriate to the discipline...." Petitioner was promoted to Associate Professor in 1980, recognized by the University as having the level of degree appropriate to his discipline (Hotel, Restaurant, and Tourism Management - there are very few doctorate programs in this specialized discipline) and in satisfying the requirement for externally recognized work through his thirty plus years of hospitality management experience in the industry and field and his research

endeavors in scholarly publications.

REPLY TO RESPONDENTS' POINTS

1. The final judgment or decree of the New Jersey Supreme Court may be reviewed by the Honorable Court.

The United States Supreme Court may review the final judgment or decree of the highest court of a state in which a decision could be had. 28 U.S.C. § 1257. In the instant matter, the New Jersey Supreme Court, the highest state court in which petitioner has sought, and could have sought review of this matter, including the constitutional questions, has rendered a decree filed on June 5, 1996 denying certification of the case for hearing. (See Petition for a Writ of Certiorari, App. 5). This decree and the lower court determinations are hence reviewable by the Honorable Court. In the instant case, petitioner argues that he has been denied procedural due process by the New Jersey courts.

Respondents' citations to Sullivan v. Texas, 207 U.S. 416, 420 (1908) and Adam v. Saenger, 303 U.S. 59, 61 (1938) are not applicable to the instant case. In both of those cases, the Texas Supreme Court denied hearing the matters "for want of jurisdiction." In the instant matter, the New Jersey Supreme Court did not deny certification because of lack of jurisdiction, thus the determination of the New Jersey Supreme Court is the decree of the highest State court in which a decision could be had. Review of this decree and of the judgments of the lower state courts in the matter is therefore sought.

2. The State court proceedings may be considered final for purposes of Rule 13.

The New Jersey Supreme Court determination denying certification was filed on June 5, 1996. Unfortunately, petitioner's counsel did not receive that decision until June 10, 1996. In light of this delay and since the period for filing subsequent motions is very short (ten days) in New Jersey, petitioner is concerned that the June 18, 1996 motions for reconsideration of the petition for certification and for a due process order (See Petition for a Writ of Certiorari, App. 1) may not be considered by the New Jersey Supreme Court as timely filed and received by it. Thus, for purposes of Rule 13.3, absent an extension of time from the New Jersey Supreme Court for the subsequent motions, the June 5, 1996 entry of its final decree became the operative date for filing the Petition for a Writ of Certiorari with the Honorable Court. Under Rule 14.5, the Clerk of the U.S. Supreme Court afforded additional time for filing of the Petition for a Writ of Certiorari, which was timely filed with this Honorable Court.

At this time, the New Jersey Supreme Court has not rendered a decision on the two motions before it. It is understood that the federal rule (Rule 13) governs, thus the Petition for a Writ of Certiorari was filed so that it would be timely under that Rule and would not be lost. (See Petition for a Writ of Certiorari, p.1).

3. Parties to the matter have been listed pursuant to Rule 12.

Petitioner acknowledges that the primary respondent in this matter is Fairleigh Dickinson University. Since the matter entails issues related to procedural due process by the

lower courts, the University and its officials, the individual respondents (Francis J. Mertz, Nancy S. Barrett, and Mordechai Rozanski) as agents of the University are listed as parties under Rule 12. The University and the three individuals were all listed as parties at the inception of the case in the complaint filed in the Superior Court of New Jersey, Law Division (Bergen County).

4. The first question presented does raise a federal question.

Petitioner has specifically raised federal constitutional due process questions in his Petition for a Writ of Certiorari, most particularly stated in the section thereof setting forth the "Reasons for Granting the Petition." The specific federal constitutional provisions and issues are therein set forth. The petition must be read as a whole. The case cited by respondents in New York Central & Hudson Railroad Co. v. City of New York, 186 U.S. 269 (1902) actually confirms that petitions should be looked at in their entirety.

Respondent acknowledges that federal constitutional issues were raised in the N.J. Superior Court, Appellate Division, by contending in the Respondent's Brief in Opposition, p.6, that, "In fact, the issues raised in the First Question Presented were resolved by the New Jersey Superior Court, Appellate Division solely on independent state-law grounds."

Petitioner in the Petition for a Writ of Certiorari, pp. 8-16, has given a concise statement of when the federal questions were raised, a summary thereof, and where the specific references are in the record below. For the Court's reference, the following is an excerpt from the plaintiff-appellant's brief to the N.J. Superior Court, Appellate

Division:

> The general definition of tenure connotes two concepts, time and possession. The U.S. Supreme Court in Board of Regents v. Roth, 408 U.S. 564 (1974), and Perry, supra., have provided a context for the ascription of a property interest in academic tenure. They have included an analysis thereof under the Fourteenth Amendment to the Constitution and the rights to due process. See expert testimony relating to tenure and its definition...

A key element in the decision of the New Jersey Superior Court, Appellate Division, is the application of the "dominant" or "principal" purpose rule in contract interpretation from the case of Newark Publisher's Assoc. v. Newark Typographical Union, 22 NJ 419 (1956). In applying this rule for the first time, which that court indicates "undoubtedly guided...the trial judge..." (See Petition for a Writ of Certiorari at App. 14-15), the tenure by procedure method of the contract between Healy and Fairleigh Dickinson University was found to be dominant and controlling, though the court failed to effect that same procedure for the benefit of petitioner and thereby denied him procedural due process under the 14th Amendment of the U.S. Constitution. Petitioner timely raised this point on appeal to the New Jersey Supreme Court.

Unlike many of the cases cited in Respondents' Brief in Opposition, where there is a federal question related to the constitutionality of a statute, the instant case raises federal constitutional issues relative to the procedural due process

accorded (or not accorded) petitioner by the state courts. The state courts failed to give complete and consistent effect to the jury and judicial determinations confirming Healy's faculty status, depriving him of the very procedures which the N.J. Superior Court, Appellate Division, states are applicable. (See Petition for a Writ of Certiorari, App. 1-4).

The U.S. Supreme Court has acted to protect federal due process rights of individuals with respect to actions of the state courts in such cases as Shelley v. Kraemer, 334 U.S. 1 (1948) and Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930). These cases, unlike many of those cited in Respondents' Brief in Opposition, directly relate to the two questions presented by petitioner, since they relate to the procedural due process accorded (or not accorded) in the state courts that is protected by the due process clause of the Fourteenth Amendment.

5. The second question presented raises a federal question.

Petitioner first presented the applicability of the 1940 Statement of Principles on Academic Freedom and Tenure to his case at trial through the testimony of his expert witness, Dr. Donald Koster. The N.J. Superior Court, Appellate Division, ruled that "...once the trial court correctly determined that the interpretation of the contract language was a legal matter, she was obligated to disregard the expert's opinion concerning it interpretation." Healy v. Fairleigh Dickinson University, 287 N.J. Super 407, 413 (1996), 671 A.2d 182, 185 (1996). Such a sweeping so-called obligation to disregard the expert's testimony regarding the distinct and unique practices and procedures in academe indicates the morass in which petitioner's procedural due process has been neglected and harmed by the

state courts.

Both the trial court and the Appellate Division totally ignored in their decisions the applicability of the 1940 Statement of Principles on Academic Freedom and Tenure, which the University specifically subscribed to in its contract documents with petitioner. The case of Shelley, infra. involved improper state court action, violative of the Fourteenth Amendment, in the enforcement of contractual provisions between private parties. The instant case involves a converse issue, that is the failure of state courts, in violation of the Fourteenth Amendment due process clause, to enforce expressed procedural provisions of a contract between private parties impacting an individual's freedom of expression and property rights.

The University has voluntarily and knowingly ascribed to the 1940 Statement of Principles on Academic Freedom and Tenure. Petitioner must rely on the courts for the enforcement of the University's express agreement as to these nationwide procedures which are designed specifically to protect freedom of speech (academic freedom). Nothing precludes a private institution, including those such as the respondent which receive state funding, from adhering to the concept of academic freedom, freedom of speech, and academic tenure, and agreeing in their contracts with faculty to assure the same. The courts are not precluded by federal constitutional law from enforcing such contract provisions because the institution is considered private. In this regard, the last clause of the Second Question Presented is quite pertinent, "...which the state courts are called upon to uphold....." Petitioner must rely on the courts to uphold procedural due process as expressly agreed in the contract documents.

6. The second question presented raises an issue that has been raised in the record below.

The very first point in petitioner's brief to the New Jersey Supreme Court (page 7) opens with a key reference to academic freedom and the First Amendment from Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967), which has also been set forth in the Petition for a Writ of Certiorari at page 15. Further, various arguments relative to due process associated with academic freedom (which under Keyishian is of special concern of the First Amendment) were therein presented. For example, from pages 17-18 of that brief are the following excerpts:

> The U.S. Supreme Court in Board of Regents v. Roth, 408 U.S. 564 (1974) and Perry v. Sinderman, 92 S.Ct. 2717 (1972) have provided a context for the ascription of property interest in academic tenure, and the rights to due process under the Fourteenth Amendment to the U.S. Constitution. Since academic tenure is itself a procedural protection existing in academe to protect academic freedom and a faculty member's livelihood so that he or she can exercise academic freedom, the property and liberty interests protected by law include the livelihood or positions of the faculty member and also include the freedom of speech so necessary in the university setting. The 1940 Statement to which the University has subscribed clearly sets forth that academic tenure relates to academic freedom, and that academic freedom is to be afforded not only to tenured faculty, but also

to non-tenured faculty, (Pa 118). "Academic Freedom is of special concern of the First Amendment," Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (Brennan, J.), see also Meyer v. State of Nebraska, 262 U.S. 390 (1923). The Supreme Court is thus requested to find as a matter of law this relationship of academic tenure to academic freedom and discern how it thereby affects constitutional rights as in this case where Healy exercised his academic freedom to speak on a matter of public concern in protecting the interests of students and alumni.

CONCLUSION

Petitioner seeks basic procedural due process, as protected by the U.S. Constitution, in a matter in which the lower courts have effectively deprived him of his property interests in his livelihood and contractual rights as well as his liberty rights associated with academic freedom and freedom of speech, without completely giving effect to the jury and judicial findings of his faculty status and the attendant rights and procedures clearly associated therewith as set forth in his contract with the University and in the 1940 Statement of Principles on Academic Freedom and Tenure which is part of that contract.

Respectfully submitted,

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Dated October 30, 1996